

## Testing the Waters : Aboriginal Title Claims to Water Spaces and Submerged Lands – An Overview

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### Résumé de l'article

L'auteure dans le présent article aborde les questions liées au titre autochtone sur les eaux et sur les terres submergées. Bien que la Cour suprême du Canada ait élaboré le test relatif à l'existence d'un titre autochtone sur le territoire dans l'affaire Delgamuukw en 1997, la question relative à l'application de ce test sur les eaux et les terres submergées demeure entière. Plusieurs groupes autochtones au Canada ont récemment déposé des actions et revendiquent un titre autochtone sur l'estran, la mer, le fond marin ainsi que dans les Grands Lacs et leurs voies navigables. Des revendications similaires pourraient également faire surface au Québec dans un proche avenir, notamment au sujet du fleuve Saint-Laurent. L'auteure examine donc les récents développements à l'échelle internationale et soulève des questions de droit et de preuve qui nécessiteront une réflexion approfondie dans un proche avenir. Enfin, elle conclut sur le rôle fondamental que seront sûrement appelés à jouer les principes de réconciliation et de consultation dans les revendications du titre autochtone sur les eaux et sur les terres submergées.

# Testing the Waters : Aboriginal Title Claims to Water Spaces and Submerged Lands – An Overview

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Paula QUIG\*

*[...] the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means<sup>1</sup>.*

*This article provides an overview of some of the intriguing issues raised by Aboriginal title claims to water spaces and submerged lands. While the Supreme Court of Canada articulated a test for proof of Aboriginal title in the 1997 Delgamuukw decision, they did not squarely address questions relating to the viability of such claims outside of the “dry land” context. Recently, a number of Aboriginal groups from across Canada have filed claims seeking declarations of Aboriginal title in areas such as the foreshore, the sea, the seabed, and the Great Lakes and their connecting waterways. Similar claims might also surface in Quebec in the near future, in areas such as the St. Lawrence Seaway. The author guides the reader through international developments in this area, highlights*

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\* The author is Counsel, Department of Justice Canada, and a member of the Law Society of Upper Canada. She would like to take this opportunity to express special thanks to Lynne Huestis for sharing her expertise, thoughts and useful comments in relation to this article. In addition, she is grateful for the comments and support provided by her fellow colleagues, including Richard Boivin, Stefan Matiation, Andrew Saranchuk and Kerry Wilkins. Lastly, she would like to thank David Bloch for providing useful information on developments in the United States with respect to Aboriginal claims to water spaces and submerged lands. The opinions expressed in this article are solely those of the author, and do not represent the opinions or policies of the Department of Justice Canada. Any errors or omissions are solely those of the author.

1. *Calder v. British Columbia (Attorney-General)*, [1973] S.C.R. 313 per Judson J. at 156 [hereinafter *Calder*].

*some key legal and evidentiary issues which will require serious reflection in the near future, and provides some final thoughts with respect to the fundamental role which the goal of reconciliation and the principle of consultation will undoubtedly play in Aboriginal title cases to water spaces and submerged lands.*

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*L'auteure dans le présent article aborde les questions liées au titre autochtone sur les eaux et sur les terres submergées. Bien que la Cour suprême du Canada ait élaboré le test relatif à l'existence d'un titre autochtone sur le territoire dans l'affaire Delgamuukw en 1997, la question relative à l'application de ce test sur les eaux et les terres submergées demeure entière. Plusieurs groupes autochtones au Canada ont récemment déposé des actions et revendiquent un titre autochtone sur l'estran, la mer, le fond marin ainsi que dans les Grands Lacs et leurs voies navigables. Des revendications similaires pourraient également faire surface au Québec dans un proche avenir, notamment au sujet du fleuve Saint-Laurent. L'auteure examine donc les récents développements à l'échelle internationale et soulève des questions de droit et de preuve qui nécessiteront une réflexion approfondie dans un proche avenir. Enfin, elle conclut sur le rôle fondamental que seront sûrement appelés à jouer les principes de réconciliation et de consultation dans les revendications du titre autochtone sur les eaux et sur les terres submergées.*

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Over three decades have passed since Judson J. of the Supreme Court of Canada (SCC) articulated his understanding of the Aboriginal interest in land. It would seem from his now famous words that the honourable Justice was of the view that Aboriginal title claims must always be approached in a manner which recognizes that Aboriginal peoples were already living in Canada before the arrival of European settlers, and which respects and honours their traditional patterns and understandings of land use and occupation.

Following the *Calder* decision various justices of the SCC endorsed Judson J.'s understanding of the nature of Aboriginal title<sup>2</sup>. The landmark *Delgamuukw*<sup>3</sup> decision was no exception. Lamer C.J. implicitly adopted Justice Judson's decision in the course of setting out the test for proof of Aboriginal title, which he based on exclusive occupation of land at sovereignty as demonstrated through both common law and Aboriginal perspectives. Further, in his reasons LaForest J. explicitly endorsed the learned Justice's description of Aboriginal title, stating that the foundation of Aboriginal title was succinctly described by Judson J. in *Calder*<sup>4</sup>.

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2. Relying in part on Judson J.'s remarks, Dickson J. (as he was then) wrote in *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 382, that Aboriginal peoples have a "legal right to occupy and possess certain lands, the ultimate title to which is in the Crown". More recently, Judson J.'s views were reiterated in *R. v. Van der Peet*, [1996] S.C.R. 507 at para. 30 [hereinafter *Van der Peet*], when Lamer C.J., writing for the majority, expressed that the doctrine of Aboriginal rights (one aspect of which is "Aboriginal title") arises from "one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land and participating in distinctive cultures, as they had done for centuries".
  3. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*].
  4. *Ibid.*, para. 189 (per LaForest J.).

The proposition that both common law and Aboriginal perspectives play a prominent role in Aboriginal title determinations is likely to take on even greater significance in the context of those claims that fall outside of existing common law understandings of property ownership. Aboriginal title claims to water spaces<sup>5</sup> and lands located underneath water ("submerged lands")<sup>6</sup> clearly fit into this category. These novel claims have recently surfaced in provinces such as British Columbia<sup>7</sup>, Ontario<sup>8</sup> and New

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5. The term "water spaces" is used throughout this article to reflect the fact that many Aboriginal groups have claimed title to entire marine areas and ecosystems, including the water itself and the living and non-living natural resources in these areas, including minerals, oil and gas.
  6. The term "submerged lands" is used throughout this paper in recognition of the fact that many Aboriginal groups have claimed title to the actual lands covered or submerged by water. "Submerged lands" is thus meant to refer to lands such as the foreshore, the seabed, the subsoil, and the beds of navigable and non-navigable lakes, rivers and streams.
  7. See: *The Council of the Haida Nation et al. v. Her Majesty the Queen in Right of the Province of British Columbia and the Attorney General of Canada*, Statement of Claim, Action, No. L020662, Vancouver Registry, November 14, 2002; *Ahousaht Indian Band and the Ahousaht Nation et al. v. The Attorney General of Canada and Her Majesty the Queen in Right of the Province of British Columbia*, Writ of Summons, No. S033335, Vancouver Registry, June 19, 2003; *Lax Kw'alaams Indian Band et al. v. Attorney General of Canada and Her Majesty The Queen in Right of the Province of British Columbia*, Statement of Claim, Action No. L023106, Vancouver Registry, January 31, 2003. See also: T. M. RANKIN, "Offshore Oil and Gas and Coastal British Columbia: The Legal Framework", (2004) 62 (4) *The Advocate* at 497 [hereinafter RANKIN]; D.M. JOHNSTON, *B.C. Offshore Development Issues: The 2002 Dunsmuir Symposium Report*, Victoria, The Maritime Awards Society of Canada, 2002; C.R. BROWN and J.I. REYNOLDS, "Aboriginal Title To Sea Spaces: A Comparative Study", (2004) 37 *U.B.C.L. Rev.* 449 [hereinafter BROWN and REYNOLDS]; D.J.R. MOODIE, "Aboriginal Maritime Title in Nova Scotia: An "Extravagant and Absurd Idea"?", (2004) 37 *U.B.C.L. Rev.* 495 [hereinafter MOODIE].
  8. See: *Walpole Island First Nation, Bkejwanong Territory v. Attorney General of Canada and Her Majesty the Queen in Right of Ontario*, Statement of Claim, Court File No. 00-CV-189329, Ontario Superior Court of Justice, April 26, 2000; *Chippewas of Nawash Unceded First Nation and Saugeen First Nation v. The Attorney General of Canada and Her Majesty the Queen in Right of Ontario*, Statement of Claim, Ontario Superior Court of Justice, Court File No. 03-CV-261134CM1, served January 5, 2004. A motion to strike those portions of the above pleadings dealing with Aboriginal title to the Great Lakes and their connecting waterways was dismissed by Carnwath J. of the Ontario Superior Court of Justice on May 13, 2004 (leave to appeal dismissal denied by Matlow J. of the Ontario Divisional Court September 15, 2004). See also: E.R. TZIMAS, "Aboriginal Title Claims to the Great Lakes Waters and their Connecting Waterways: The Challenges that Lie Ahead", paper presented at the Canadian Aboriginal Law 2003 Conference, Ottawa, Ontario, September 10 and 11, 2003. Pacific Business and Law Institute, 2003 [hereinafter TZIMAS].

Brunswick<sup>9</sup>, where Aboriginal groups have sought declarations of Aboriginal title to areas such as the foreshore<sup>10</sup>, the seabed, the territorial sea of Canada<sup>11</sup>, and the beds of navigable waterways, including certain Canadian portions of the Great Lakes. Similar claims may well arise elsewhere in Canada in relation to both small inland waterways and large bodies of water, such as the St. Lawrence Seaway<sup>12</sup>. As these claims navigate their way through our judicial system we will be compelled to take a serious look at whether the common law doctrine of Aboriginal title is sufficiently flexible to deal with these particular Aboriginal interests<sup>13</sup>. This will necessitate consideration of the appropriateness of using the Aboriginal title test set

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9. See *Eel Ground Indian Band v. Her Majesty the Queen in Right of Canada and the Attorney General of Canada*, Statement of Claim, Court of Queen's Bench of New Brunswick, Court File No. N/C/152/03. See also: MOODIE, *supra*, note 7, for discussion on Shubenacadie Band's claim of Aboriginal sovereignty in the east coast (St. Mary's Bay, Digby County).
  10. According to Anger and Honsberger, the foreshore is the seashore up to the point of high water of medium tides, between spring and neap tides: H.D. ANGERS and others, *Anger and Honsberger: Law of Real Property*, 2nd ed., vol. 2, Aurora, Canada Law Books, 1985, at 998 [hereinafter *ANGER and HONSBERGER*].
  11. Sections 4 and 5 of the *Oceans Act*, S.C. 1996 c. 31 (in force as of January 31, 1997) [hereinafter *Oceans Act*], provide that Canada's territorial sea consists of a belt of sea that has as its inner limit the low water line along the coast or on a low-tide elevation, and its outer limit the line every point at which is at a distance of 12 nautical miles from the nearest point of the baselines.
  12. See *Grand Chief Angie Barnes et al. v. Her Majesty the Queen in Right of Canada et al.*, Amended Statement of Claim, Federal Court of Canada, Court File No. T-567-04, Amended April 30, 2004, in which the Mohawks of Akwesasne sought an injunction to prohibit ice-breaking activities in the St. Lawrence alleging, among other things, they hold Aboriginal title to the area.
  13. The SCC has yet to address the question of whether Aboriginal title to water spaces and submerged lands is theoretically possible under our current legal regime, though such issues have not completely fallen of its radar screen. In both *R. v. Côté*, [1996] 3 S.C.R. 139 [hereinafter *Côté*] and *R. v. Adams*, [1996] 3 S.C.R. 101 [hereinafter *Adams*], the Aboriginal claimants initially argued they held Aboriginal fishing rights in the claim area, which included waters and submerged lands, based on their Aboriginal title to that area, their treaty rights and the *Royal Proclamation of 1763*. However, the SCC ruled on the narrower ground of Aboriginal rights after finding it was simply not necessary for an Aboriginal group to prove title in order to show an Aboriginal right to fish in the claim area. (Of particular interest are the reasons of Barrette Ct. S.P.J.'s at trial in *R. v. Adams*, [1985] 4 C.N.L.R. 123 at 135, as well as the reasons given by Beauregard J.A. of the Court of Appeal of Quebec in *R. v. Adams*, [1993] 3 C.N.L.R. 123). Furthermore, in *Calder*, *supra*, note 1, the SCC made no distinction between land and water when the Nishga Tribal Council claimed extensive marine areas, including Observatory Inlet, Portland Canal and Portland Inlet. Importantly, Hall J. (Spence and Laskin JJ. concurring) stated at 174 that Aboriginal title is a right to occupy the lands and enjoy the fruits of the soil,

out by the SCC in *Delgamuukw* outside of the “dry land” context and, as alluded to above, will signal a need for further clarification with respect to the precise role of Aboriginal legal traditions and perspectives in relation to exclusive occupation. It will also lead us to reflect on such matters as the nature of the Crown’s sovereignty in navigable water bodies, the interplay between common law public rights of navigation and fishing and exclusive Aboriginal title rights, the applicability of provincial laws to s. 91(24) lands, and the implications which a finding of Aboriginal title in the offshore, or in an expansive water body such as the Great Lakes, could have for Canada’s obligations in the international arena.

While we do not presently have clear guidance from the courts as to the viability of Aboriginal title to water spaces and submerged lands, these unique claims may be examined with reference to those instruments provided by the courts and the legislatures to date. The fundamental purpose of reconciliation that underpins s. 35 (1) of the *Constitution Act, 1982*<sup>14</sup> represents one such tool. In addition, the Aboriginal title test set out in *Delgamuukw*, though not specifically developed with these claims in mind, can serve as a useful starting point for gauging the viability of these claims. Given this, the following pages provide an overview of Aboriginal title claims to water spaces and submerged lands through the lens of these two instruments while also highlighting some intriguing legal and evidentiary issues likely to require serious reflection in the future.

However, before embarking on this exercise it is essential to take a closer look at the manner in which the courts in other common law countries have dealt with those claims to water spaces and submerged lands which have come before them for consideration. This enables us to consider the abstract issues outlined above within their practical context, and moves us a step closer towards grappling with the unique challenges that lie ahead.

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the forests and of the rivers and streams, and noted that the *use of water was an integral part of the historic occupation and possession* of the territory. Lastly, in her dissenting judgment in *Van der Peet*, *supra*, note 2, McLachlin J., as she was then, referred to the longstanding common law recognition of Aboriginal “interests” in waters at para. 275 stating: “It thus emerges that the common law and those who regulated the British settlement of this country predicated dealings with aboriginals on two fundamental principles. The first was the general principle that the Crown took subject to existing aboriginal interests in the lands they traditionally occupied and *their adjacent waters, even though those interests might not be of a type recognized by British law.*” [Emphasis mine]

14. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), c. 11 [hereinafter *Constitution Act, 1982*].

## 1 International developments

Aboriginal title claims to water spaces and submerged lands have emerged in a number of common law countries over the course of the past few years. These claims have been met by both judicial and, in some cases, legislative intervention. The following section highlights some of the most significant developments coming out of Australia, New Zealand and the United States<sup>15</sup>. While there are key differences between the Canadian approach to Aboriginal title and the approaches adopted in other countries it is still likely that our courts will look to foreign judicial and legislative developments in the course of deliberating on Aboriginal title to water spaces and submerged lands given the paucity of Canadian case law in this area.

### 1.1 Australia

The Australian courts have had occasion to consider native title claims solely to areas below high water mark on two occasions, the first being in the *Commonwealth of Australia v. Yarmirr*<sup>16</sup> case, and the second being in the *Lardil Peoples v. State of Queensland*<sup>17</sup> case.

The *Yarmirr* case dealt with a claim under s. 223 of the *Native Title Act*<sup>18</sup> to exclusive native title rights and interests to the sea and seabed in northern Australia. The Commonwealth argued that the native title rights and interests being claimed in that case could not be recognized at common law based on their view that the common law did not extend beyond the low water mark. They further contended that the native title rights and interests claimed could not exist in the claim area because the Crown itself did not even hold radical title to the area in question.

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15. This section on international developments uses language such as “native title rights and interests” and “Maori customary lands” in order to reflect the Australian and New Zealand conceptions of Aboriginal title. American jurisprudence employs the term “Aboriginal title”, though it is to be noted that there remain differences between Canadian and US approaches to Aboriginal title.

16. *Commonwealth of Australia v. Yarmirr*, (2001) 208 C.L.R. 1 [hereinafter *Yarmirr*].

17. *Lardil Peoples v. State of Queensland*, [2004] FCA 298 [hereinafter *Lardil Peoples*].

18. *Native Title Act 1993*, Act No. 110 of 1993 [hereinafter *Native Title Act*]. Section 223 of the Act defines “native title” or “native title rights and interests” as the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where: the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and the rights and interests are recognized by Australian common law.



The High Court ultimately found that the common law did extend beyond the low water mark, and thus it was theoretically possible to recognize some native title rights and interests in the claim area<sup>19</sup>. In addition, the majority of the High Court found that the existence of underlying or radical Crown title in the claim area was not a necessary prerequisite for a finding of native title. According to the High Court, the common law could theoretically recognize, pursuant to s. 223 of the *Native Title Act*, native title rights and interests in relation to areas beyond the low water mark since native title rights and interests were said not to be created by, or to be derived from, the common law<sup>20</sup>. They went on to hold that the law relating to the territorial sea of Australia was not inconsistent with the common law of Australia recognizing native title rights and interests in relation to the sea or the seabed.

However, they also found that the rights and interests that had been asserted at sovereignty carried the recognition of public rights of navigation and fishing, and perhaps, the concession of an international right of innocent passage. According to the Court, because of the inconsistency between the rights and interests asserted at sovereignty and the exclusive native title rights and interests being claimed by the appellants, those native title rights that could be recognized at common law could *not* be exclusive in nature<sup>21</sup>.

Thus, in *Yarmirr* the court found that the public rights of navigation and fishing, and the international right of innocent passage, came with the assertion of sovereignty by the Crown, and accordingly, held that the assertion of sovereignty was fundamentally inconsistent with the continued existence of the exclusive native title rights and interests being claimed<sup>22</sup>. In turn, the Court found that it was only possible to recognize a form of *non-exclusive* native title in northern Australia's sea and seabed. This said, even if the Court had reached a different conclusion with respect to the effect of these public and international rights, exclusive native title rights would likely not have been found in *Yarmirr*. This is because the High

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19. *Yarmirr*, *supra*, note 16, para. 34.

20. *Ibid.*, para. 48-50.

21. *Ibid.*, para. 61 and 76.

22. According to the court, this inconsistency was of no different quality than the inconsistency that arises as a result of the exercise of a sovereign power, such as the granting of a fee simple estate, which, in Australia, has been recognized as having the effect of extinguishing native title rights and interests : See *Yarmirr*, *supra*, note 16 at para. 100.

Court had upheld the primary judge's ruling to the effect that the evidence presented at trial was insufficient to establish that any exclusive right was part of the traditional laws and customs of the claimant Aboriginal group<sup>23</sup>.

The *Yarmirr* case was followed in *Lardil Peoples*. In that case the Lardil, Yangkaal, Gangalidda and Kaiadilt peoples had brought an application under the *Native Title Act* for a determination that native title exists in the seas around the Wellesley Islands and the mainland coast in the southern Gulf of Carpentaria<sup>24</sup>. The Federal Court of Australia ultimately held that each of the applicant Aboriginal communities had certain native title rights and interests in the determination area, which included both inland and offshore land and water areas<sup>25</sup>.

This said, the native title rights recognized by the Court were limited to rights of access for the purposes allowed by and under the traditional laws and customs of the claimant Aboriginal groups, rights to fish, hunt and gather living and plant resources, and rights to access the land and waters below the high water mark for the purposes allowed under traditional laws and customs for religious and spiritual purposes<sup>26</sup>. Importantly, the Court held that the native title rights and interests held by the claimants did not include possession, occupation, use and enjoyment of the land and waters to the *exclusion* of all others, or rights or interests in minerals and petroleum in the determination area<sup>27</sup>. Further, the Court explicitly stated that those native title rights and interests must yield to other interests created by the Crown, as well as the rights and interests of members of the public arising under the common law or applicable international law<sup>28</sup>.

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23. *Yarmirr*, *ibid.*, para. 88.

24. See J. BEHRENDT, *The Wellesley Sea Claim: An Overview*, [Online], 2004, [www.aiatsis.gov.au/rsrch/ntru/conf2004/papers/pdfs/JasonBehrendt.pdf] (February 2, 2005) [hereinafter BEHRENDT].

25. Specifically, the Court held that the applicants had native title to the intertidal zone and adjoining seas for a distance of 5 nautical miles (nm) or 9.8 km from islands inhabited at sovereignty, a distance ranging from 2.7 nm to 5 nm on the mainland coast and a half nautical mile around other islands: see *Lardil Peoples*, *supra*, note 17, para. 245.

26. *Lardil Peoples*, *ibid.*

27. *Ibid.*

28. *Ibid.* For more information on the distinctions between Australian and Canadian law in relation to Aboriginal rights and title claims to water spaces and submerged lands, see J.I. REYNOLDS, *Aboriginal Title to the Seabed: A Comparative Introduction*, Ottawa, Pacific Business & Law Institute, 2003 [hereinafter REYNOLDS] and BROWN and REYNOLDS, *supra*, note 7. For present purposes it should be noted there is a blurring of the distinction between Aboriginal title and rights in Australia, and native title does not have the same level of protection in Australia as it does in Canada. For one, native title rights in Australia do not have constitutional protection given that there is no equivalent

## 1.2 New Zealand

New Zealand has also recently dealt with claims to waters and submerged lands. In *Ngati Apa et al. v. The Attorney General et al.*<sup>29</sup> the New Zealand Court of Appeal unanimously held that the Maori Land Court had jurisdiction to determine whether certain lands below the mean high water mark on the Marlborough Sounds were Maori customary lands<sup>30</sup>. In making this determination, the Court of Appeal rejected the argument that the rights of non-Crown title holders to coastal lands below the high water mark were either incapable of existing at common law, or had been extinguished by statute. In addition, the Court dealt with the issue of whether Maori customary title could technically be found in those areas in which the Crown itself may not even possess underlying or radical title<sup>31</sup>.

The decision of the Court of Appeal was based on preliminary and general questions of law, and cannot be taken to have established Maori customary land below the high water mark, or to have resolved issues concerning the nature of any property interests in such lands. Rather, the appeal only dealt with the initial question of whether the Maori Land Court could enter into a substantive inquiry with respect to claims for customary title<sup>32</sup>. This said, the Court's reasoning is still interesting for present purposes.

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to s. 35 of the *Constitution Act, 1982* in Australia. Lastly, both the *Yarmirr*, *supra*, note 16, and *Lardil Peoples*, *supra*, note 17, cases were brought under the *Native Title Act*, *supra*, note 18, which defines native title as the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters which are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders. The test for native title in the *Native Title Act* appears to be a codification of the common law test articulated in *Mabo v. Queensland [No. 2]*, (1992) 175 C.L.R. 1, which is primarily based on the pre-existing laws and customs of Aboriginal groups and Torres Strait Islanders, as distinct from its Canadian counterpart which is based on exclusive occupation at sovereignty. This, coupled with the fact that the *Native Title Act* itself contemplates the possibility of native title rights in relation to waters, could call into question the weight Canadian courts would accord Australian jurisprudence in this area.

29. *Ngati Apa, Ngati Koata, Ngati Kuia, Ngati Rarua, Ngati Tama, Ngati Toa and Rangitane And Anor v. The Attorney-General And Ors*, (CA) CA173/01, [19 June 2003] Court of Appeal of New Zealand [hereinafter *Ngati Apa*].

30. The five justices of the New Zealand Court of Appeal wrote four judgments, all of which reached the same result and provided similar reasoning. See in particular the judgment of Elias J., para. 90-91.

31. *Ngati Apa*, *supra*, note 29, para. 30.

32. This point is stressed by Elias J., para. 8-9 of *Ngati Apa*, *ibid.*

For one, it is worth noting that the Court held that the Maori Land Court had jurisdiction to consider a claim to Maori customary title to land below the high water mark. In other words, it did not dismiss the idea of customary title in these areas outright, or hold that such claims were not cognizable to the common law. In addition, in finding that the Maori Land Court had jurisdiction to consider these types of claims, the New Zealand Court of Appeal overturned their prior ruling in the *Re Ninety-Mile Beach*<sup>33</sup> case. In *Re Ninety-Mile Beach* it was held that the transmutation of customary land bordering the sea into Maori freehold land extinguished customary Maori interests over the foreshore and the seabed. The overturning of *Re Ninety-Mile Beach* by all justices of the Court of Appeal, with the exception of the President of the Court, arguably dissolved the previous assumption that there was no seaward Maori customary title in New Zealand<sup>34</sup>.

As an interesting side note, the *Ngati Apa* decision was met with much resistance from both the members of the public and from the New Zealand government. The government of New Zealand introduced the *Foreshore and Seabed Policy* in August 2003 as a response to the decision of the Court of Appeal<sup>35</sup>. The policy essentially removes the ability of the Maori to go to the High Court or to the Maori Land Court for definition and declaration of their legal rights in the foreshore and seabed. Instead, it endorses a regime that would recognize lesser and fewer Maori rights, and does so without a guarantee of compensation for the loss of those Maori customary rights, if any, which exist in the foreshore and the seabed.

Maori across New Zealand expressed strong dissatisfaction with this policy, and a request was made to the Waitangi Tribunal for an urgent inquiry into the policy. The Waitangi Tribunal released its report on the policy on March 8, 2004<sup>36</sup>. The tribunal fiercely criticized the policy, recommended its abandonment, and strongly urged the government to instead engage with the Maori in proper negotiations with respect to the

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33. *Re Ninety-Mile Beach*, [1963] N.Z.L.R. 461 [hereinafter *Re Ninety-Mile Beach*].

34. *Brief of Evidence of Dr. Paul Gerard McHugh* dated 13 January 2004, submitted to the Waitangi Tribunal, *In the Matter of the Treaty of Waitangi Act 1975 and In the Matter of Applications for an Urgent Inquiry into Foreshore and Seabed Issues*, WAI No. 1071.

35. Note that minor adjustments were made to this policy between August 2003 and December 2003, with the refined version being the subject of the January 2004 inquiry of the Waitangi Tribunal.

36. *Report on the Crown's Foreshore and Seabed Policy*, WAI 1071, Waitangi Tribunal Report, 2004 [hereinafter *Waitangi Tribunal Report on the Crown's Foreshore and Seabed Policy*].

best way forward in this area. However, the Crown released a bill essentially codifying its *Foreshore and Seabed Policy* on April 22, 2004<sup>37</sup>, which was passed by the New Zealand legislature on November 18, 2004<sup>38</sup>.

### 1.3 United States

A number of Aboriginal title cases have arisen in the United States with respect to both inland and offshore water spaces and submerged lands. For instance, in *Inupiat Community of the Arctic Slope v. United States*<sup>39</sup> an Aboriginal group sought to dispute the sovereignty of the United States to an area lying 3 to 65 miles offshore from Alaska, including the surface of the sea, the water column beneath it, the seabed, and the minerals lying underneath the seabed<sup>40</sup>. In addition to seeking injunctive relief to prevent the United States government and oil companies from interfering with their alleged rights, the claimants sought damages and a declaration of title to, and control over, the area<sup>41</sup>. The appellants mainly rested their suit on exclusive use and occupancy of super-adjacent sea ice from time immemorial for subsistence hunting and fishing<sup>42</sup>.

Rather than address the Aboriginal rights and title issues raised by the Inupiat, the Court decided the case on the basis of a series of decisions from the United States Supreme Court<sup>43</sup> that held that the United States federal government had, as a matter of constitutional law, paramount rights in ocean waters lying seaward of the ordinary watermark<sup>44</sup>. In fact, it was not until the *Village of Gambell v. Hodel*<sup>45</sup> and *Native Village of Eyak v.*

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37. The draft legislation is entitled the *Foreshore and Seabed Bill*, 129-1, [Online], [www.beehive.govt.nz/foreshore/home.cfm.] (January 28, 2005).

38. Note that the whole of the *Foreshore and Seabed Act 2004*, Public Act No. 093, came into force on January 17, 2005. The final legislation, as well as relevant press releases, can be found at the above mentioned New Zealand government site, *supra*, note 37.

39. *Inupiat Community of the Arctic Slope v. United States*, 548 F Supp 182 at 185 (District of Alaska, 1982); 474 U.S. 820 (U.S.S.C.) October 7, 1985 certiorari denied [hereinafter *Inupiat*].

40. REYNOLDS, *supra*, note 28 at 15.

41. *Ibid.*

42. *Ibid.*

43. *U.S. v. California*, 332 U.S. 19 (1947); *U.S. v. Louisiana*, 339 U.S. 699, (1950); *U.S. v. Texas*, 339 U.S. 707 (1950); *U.S. v. Maine*, 420 U.S. 515 (1975).

44. *Inupiat*, *supra*, note 39 at 187. Note that the U.S. Court of Appeals for the Ninth Circuit rejected an appeal in the case, holding that any rights the Inupiat may have once had were extinguished by the *Alaska Native Claims Settlement Act*, 43 U.S.C. (1971).

45. *Village of Gambell v. Hodel*, 869 F.2d 1273 (9th Cir. 1989) [hereinafter *Gambell*]. See also *Amoco Production Co. v. Gambell*, 480 U.S. 531 (1987).

*Trawler Diane Marie Inc.*<sup>46</sup> cases that Aboriginal rights and title issues in water spaces and submerged lands were squarely addressed in the United States jurisprudence<sup>47</sup>.

In *Gambell* the United States Court of Appeals for the Ninth Circuit stated that Aboriginal rights may exist concurrently with a paramount federal interest in the outer continental shelf without undermining that interest<sup>48</sup>. However, the case solely dealt with non-exclusive assertions of Aboriginal subsistence rights, as opposed to exclusive Aboriginal title in the outer continental shelf of Alaska<sup>49</sup>. The court in that case clearly found that such rights were not precluded by the paramouncy doctrine or otherwise extinguished by Congress, and remanded the case back to the district court for consideration as to whether, on the evidence, the village of Gambell and the other appellants to the case held such rights, and if so, whether the drilling activities undertaken by the oil companies significantly interfered with those rights<sup>50</sup>.

The *Eyak* case involved a claim to unextinguished Aboriginal title to a portion of the outer continental shelf (OCS)<sup>51</sup>. The Court rejected the group's claim to exclusive use and occupation of the OCS of the United States on the same grounds as in *Inupiat*, even in the face of evidence showing that the group had hunted sea mammals and harvested the fishery resources of the OCS for more than 7,000 years, and demonstrating that their continued social, cultural and economic well-being depended on their ability to hunt and fish in their traditional territories<sup>52</sup>. However, in a rare move, the United States Court of Appeals for the Ninth Circuit recently voted en banc to re-evaluate this decision<sup>53</sup>. In July 2004 the Ninth Circuit en banc panel handed down its order vacating the district court's grant of summary judgment to the defendants, and remanded the case back to the district court with instructions to decide what Aboriginal rights to fish

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46. *Native Village of Eyak v. Trawler Diane Marie Inc.*, 154 F.3d 1090 (1998) [hereinafter *Eyak*].

47. See D.J. BLOCH, "Colonizing the Last Frontier", (2004) 29, *American Indian Law Review* 1, [hereinafter BLOCH].

48. *Gambell*, *supra*, note 45 at 1277; BLOCH, *ibid*.

49. BLOCH, *loc. cit.*, note 47 at 17.

50. *Ibid*.

51. REYNOLDS, *supra*, note 28 at 16.

52. *Ibid*. at 17.

53. *Eyak Native Village v. Daley*, 2004 U.S. App. LEXIS6671, No. 02-36155, United States Court of Appeals for the 9th Cir. (April 7, 2004, Filed).

beyond the three mile limit, if any, the plaintiff Aboriginal group might have. Pursuant to the order, for purposes of this limited remand the district court was to assume that the villages' Aboriginal rights, if any, had not been abrogated by the federal paramountcy doctrine or by other federal law<sup>54</sup>. Given the wording of this order it remains unclear whether Aboriginal title to areas of the offshore is within the realm of legal possibility in the United States, or whether the same is simply to be diminished in cases where there exists the potential for conflict between such title and federal paramountcy<sup>55</sup>.

Lastly, in *Idaho et. al. v. Cœur d'Alene Tribe of Idaho*<sup>56</sup> a federally recognized tribe brought an action against the state of Idaho, various state agencies, and numerous state officials in their individual capacities claiming the beneficial interest, subject to the trusteeship of the United States, in the beds and banks of all navigable watercourses and waters within the original boundaries of the Cœur d'Alene reservation, and alternatively, ownership of the submerged lands pursuant to unextinguished Aboriginal title. In addition, the tribe sought a declaratory judgment to establish their entitlement to the exclusive use and occupancy, and the right to quiet enjoyment of, the submerged lands; a declaration of the invalidity of all Idaho laws purporting to regulate the submerged lands; and a preliminary and permanent injunction prohibiting the defendants from taking actions in violation of their rights in these lands. The United States Supreme Court ultimately denied their claims on the basis that a grant of such rights would divest the State of Idaho of its sovereign control over submerged lands, which were seen to be lands with a unique status in the law and infused with public trust which the state itself was bound to respect<sup>57</sup>.

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54. The precise implications of this order *vis-à-vis* the 1998 decision in *Eyak*, *supra*, note 46, concerning the claim to unextinguished Aboriginal title to the outer continental shelf remain unclear at this time.

55. See BLOCH, *supra*, note 47.

56. *Idaho v. Cœur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) [hereinafter *Idaho*].

57. *Ibid.* at 283. The origins of the concept of "sovereign lands" are stated in more detail in the United States Supreme Court decision in *Utah Division State Lands v. United States et al.*, 107 S. Ct. 2318, in which Justice O'Connor discusses the history of sovereign ownership as follows at 2320: "Under English law the English Crown held sovereign title to all lands underlying navigable waters. Because title to such land was important to the sovereign's ability to control navigation, fishing and commercial activity on the rivers and lakes, ownership of the land was considered an essential attribute of sovereignty. Title to such land therefore was vested in the sovereign for the benefit of the whole people."

However, the United States Supreme Court later affirmed the Cœur d'Alene Tribe's ownership of submerged lands on their reserve beneath the internal navigable waterway in *Idaho v. United States*<sup>58</sup> by relying on treaty clauses, executive orders and congressional actions to overcome the presumption that the state of Idaho took title to all submerged lands when it joined the Union on an equal footing with the other states<sup>59</sup>.

## 2 Key Legal and Evidentiary Issues

The preceding review of international developments highlights some of the unique legal and evidentiary issues which courts in Australia, New Zealand and the United States have been asked to deal with in the course of considering Aboriginal title claims to inland and offshore water spaces and submerged lands. The remainder of this article will focus on how these issues could play out in the Canadian context. This will be done with reference to both s. 35(1) of the *Constitution Act, 1982* and the Aboriginal title test set out by the SCC in *Delgamuukw*.

### 2.1 Section 35 (1) of the *Constitution Act, 1982*

Section 35 (1) of the *Constitution Act, 1982* recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada, and has as its underlying purpose the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown. As such, it serves as an essential tool in the consideration of all Aboriginal title claims because it provides the constitutional framework through which the fact

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58. *Idaho v. United States*, 533 U.S. 262 (2001).

59. For further information on US cases in this area, see REYNOLDS, *supra*, note 28 at 14-18; BROWN and REYNOLDS, *supra*, note 7; and BLOCH, *supra*, note 47. Some of the cases not discussed in this section but worthy of note include *Alaska Pacific Fisheries v. United States*, 39 Ct. 40 (1918); *Winters v. United States*, 207 U.S. (1908); *U.S. v. Winans*, 198 U.S. 371 (1905); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. C.A., 1981); *Washington v. Fishing Vessel Assn.*, 443 U.S. 658 (1979); *People of Village of Gambell v. Clark*, 746 F. 2d 572 (9th Cir., 1984). Note also that like Australia and New Zealand, the United States does not have any instrument equivalent to s. 35 of the *Constitution Act, 1982*. In addition, James Reynolds has argued that when considering those American cases which have denied the claims brought by Aboriginal groups on the basis of the federal paramountcy doctrine one should keep in mind that Canada's *Oceans Act*, *supra*, note 11, actually provides that the rights of Canada in its territorial sea, exclusive economic zone and continental shelf do not abrogate or derogate from any legal right held before February 4, 1991, or any existing Aboriginal or treaty rights recognized under s. 35 of the *Constitution Act, 1982*. On this last point see REYNOLDS, *supra*, note 28 at 18, in which he discusses sections 2.1, 8, 14 and 18 of the *Oceans Act*.



that Aboriginal peoples lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and is reconciled with the Crown's sovereignty<sup>60</sup>.

This underlying purpose of reconciliation may well require that the scope and content of any Aboriginal title rights recognized and affirmed pursuant to s. 35(1) be defined in light of the purpose of reconciliation. In turn, courts faced with Aboriginal title claims to water spaces and submerged lands would seem to be required to take into account both the prior occupation of Aboriginal peoples and the sovereignty of the Crown when considering these claims, and to reconcile these two realities within the context of the current Canadian constitutional and legal structure, and within the broader social, political and economic community in which Aboriginal societies exist, and over which the Crown is sovereign<sup>61</sup>. This could translate into a need to allow the principle of reconciliation to shape the application of the Aboriginal title test, and in turn, the nature, content and scope of any Aboriginal title rights found pursuant to that test.

Some insight into how the principle of reconciliation factors into the Aboriginal title analysis was provided by Lamer C.J. in *Delgamuukw*. According to the learned Chief Justice, reconciliation requires that in the course of considering an Aboriginal title claim account be taken of both Aboriginal and common law perspectives, and that equal weight be placed on each<sup>62</sup>. In addition, cases such as *Van der Peet*<sup>63</sup>, *Delgamuukw*<sup>64</sup>, *Mitchell*<sup>65</sup> and *Gladstone*<sup>66</sup> can be taken for the proposition that Aboriginal rights and title only survived the assertion of Crown sovereignty to the extent they were not incompatible with this sovereignty, or were cognizable to, or did not otherwise strain, the Canadian legal and constitutional structure. To state it differently, it seems clear from these cases that part of reconciling the pre-existence of Aboriginal societies with the sovereignty of

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60. *Van der Peet*, *supra*, note 2, para. 31 and 43. See also: *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1109 [hereinafter *Sparrow*]; *R. v. Gladstone*, [1996] 2 S.C.R. 723, para. 73 [hereinafter *Gladstone*]; *Delgamuukw*, *supra*, note 3, para. 81, 148, 161, 165 and 186; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, para. 12, 174, 155 and 164 [hereinafter *Mitchell*].

61. See *Van der Peet*, *supra*, note 2 at para. 31, 43; *Mitchell*, *ibid.*, para. 74, 155 and 164 (per Binnie J.); *Gladstone*, *ibid.*, para. 73.

62. *Delgamuukw*, *supra*, note 3, para. 148.

63. *Van der Peet*, *supra*, note 2, para. 49.

64. *Delgamuukw*, *supra*, note 3, para. 82.

65. *Mitchell*, *supra*, note 60, para. 141 and 150 (per Binnie J.). Note that Binnie J.'s opinion in *Mitchell* was a concurrence. The majority judgment expressly stopped short of endorsing the notion of sovereign incompatibility.

66. *Gladstone*, *supra*, note 60, para. 67 and 770.

the Crown is determining whether the rights being claimed by an Aboriginal group can be recognized within the current Canadian legal and constitutional structure, and whether these rights would be compatible with the continued exercise of Crown sovereignty.

## 2.2 Aboriginal Title Test

As discussed above, in *Delgamuukw* Lamer C.J. stated that in order to make out a claim to Aboriginal title a claimant group must be able to demonstrate they were in exclusive occupation of land at sovereignty and, at least in cases where they rely on present occupation as proof of pre-sovereignty occupation, they must show continuity between pre-sovereignty and present occupation<sup>67</sup>. It is clear both from the manner in which this test is set out in *Delgamuukw*, and the particular facts of that case, that the test was not specifically designed to deal with claims to water spaces and submerged lands. In turn, the various components of this test present interesting legal and evidentiary issues when applied outside of the “dry land” context.

### 2.2.1 Sovereignty

As seen above, an Aboriginal group asserting Aboriginal title must establish exclusive occupation of the lands in question at the time the Crown asserted sovereignty over these lands<sup>68</sup>. While this statement appears relatively unambiguous it must be noted that in discussing the sovereignty component of the Aboriginal title test, Lamer C.J. did not fully explain what he meant by “sovereignty” in this context. In addition, he went on to introduce three different stages of sovereignty: the “assertion of sovereignty”, the generic term “sovereignty”, and the “conclusive establishment of sovereignty”, using these different concepts interchangeably throughout his reasons<sup>69</sup>. In addition, Lamer C.J. did not clearly articulate

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67. The test is set out in *Delgamuukw*, *supra*, note 3 at para 143, as follows: “In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty; (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation; and (iii) at sovereignty, that occupation must have been exclusive.”

68. *Ibid.*, at para. 143-145.

69. See for instance para. 144 of *Delgamuukw*, *supra*, note 3, where Lamer C.J. states that “the aboriginal group asserting the claim must establish that it occupied the lands in question at the time at which the Crown asserted sovereignty” as compared to the discussion at para. 145 where Lamer C.J. employs the generic term *sovereignty*, and then proceeds to speak of sovereignty over British Columbia being “conclusively established by the *Oregon Boundary Treaty of 1846*”.

how “sovereignty”, in all of its stages, is to be established. Until the SCC revisits the sovereignty question it will remain unclear whether an assertion of sovereignty, or some other stage of sovereignty, represents the relevant time period for purposes of assessing Aboriginal title claims. In addition, questions will remain as to the precise indicia which our courts will accept as proof of this sovereignty.

Aboriginal title claims to water spaces and submerged lands, particularly in the offshore context, add another level of uncertainty with respect to this aspect of the Aboriginal title test. Principles regarding ownership, jurisdiction and delineation of offshore maritime zones did not develop until the late 1800s and early 1900s. As one example, it was only in the late 1920s that legislation made explicit reference to Canada’s territorial sea<sup>70</sup>, and only in 1970 that Canada’s territorial sea was extended to 12 miles by way of legislation<sup>71</sup>. Given this, it is presently difficult to predict how courts will arrive at their findings with respect to the appropriate time period to be used in assessing Aboriginal title claims to water spaces and submerged lands, and in turn, how they will arrive at their conclusions with respect to Aboriginal title in these areas.

## 2.2.2 Exclusive Occupation

Aboriginal title claims to water spaces and submerged lands also pose significant hurdles in terms of proof of exclusive occupation. As seen earlier, according to *Delgamuukw* an Aboriginal group must prove they exclusively occupied the area subject to their claim at sovereignty in order to establish Aboriginal title. At present much debate persists as to how an Aboriginal group would actually meet the criteria of exclusive occupation

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70. *An Act to Amend the Customs Act* (1928), 18 & 19 Geo. V., c. 16, s. 1 (Can.).

71. *Territorial Sea and Fishing Zones Act*, R.S.C. 1970. Note that it was not until the mid 1960s that Canadian legislation, in the form of Canada’s *Territorial Sea and Fishing Zones Act*, S.C. 1964-65, 13 Elizabeth II, c. 22, explicitly provided for a three nautical mile territorial sea of Canada. Note also that Canada only explicitly claimed ownership and jurisdiction over the 12 nautical mile territorial sea in 1990 by way of the *Canadian Laws Offshore Application Act*, S.C. 1990, c. 44, and that it was not until 1996 that this assertion was made through the explicit statutory language of the *Oceans Act*, *supra*, note 11. Pursuant to s. 8 of the *Oceans Act* Canada claims “ownership” of this 12 nautical mile territorial sea. See also article 3 of the *United Nations Convention on the Law of the Sea*, Montego Bay, Dec. 10 1982 [in force Nov. 14 1994, U.N. Doc. A/CONF.62/122 (1982)], 21 I.L.M. 1261 [hereinafter *UNCLOS*]. Canada ratified *UNCLOS* November 7, 2003.

when title is claimed in relation to “dry land”<sup>72</sup>. Aboriginal title claims to water spaces and submerged lands are likely to lead to further complexities in this area since those indicators of exclusive occupation one might expect to see in Aboriginal title cases may be largely absent in this context.

This said, it is certainly acknowledged that we do have some guidance from the courts as to how an Aboriginal group would establish exclusive occupation under the Aboriginal title test. As mentioned towards the beginning of this article, in *Delgamuukw* Lamer C.J. stated that in determining whether there is sufficient exclusive occupation at sovereignty for a finding of Aboriginal title the courts are to have regard to both common law and Aboriginal perspectives relating to occupation and exclusivity<sup>73</sup>. According to the learned Chief Justice, Aboriginal perspectives in relation to exclusive occupation may be gleaned, in part, from Aboriginal land tenure systems or laws governing land use<sup>74</sup>.

As regards the role of the common law in this context, Lamer C.J. stated that Professor Kent McNeil has convincingly argued that the fact of physical occupation is proof of possession at common law, which in turn will ground title to land<sup>75</sup>. According to Lamer C.J., the common law perspective in relation to occupation may be evidenced in a variety of ways, including construction of dwellings, cultivation and enclosure of fields, and regular use of definite tracts of land for hunting, fishing or otherwise exploiting resources<sup>76</sup>. He further stated that in making a determination with respect to occupation, a court may consider such things as the Aboriginal group’s size, manner of life, material resources, and technological abilities, as well as the character of the lands claimed<sup>77</sup>.

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72. For instance, this is evident from the *R. v. Bernard*, 2003 N.B.C.A. 55 [hereinafter *Bernard*], and *R. v. Marshall*, 2003 N.S.C.A. 105 [hereinafter *Marshall*], decisions out of the New Brunswick and Nova Scotia Courts of Appeal respectively. For a synopsis of the manner in which such issues were dealt with in *Marshall*, *supra*, see MOODIE, *supra*, note 7 at para. 42-50.

73. See *Delgamuukw*, *supra*, note 3 at para. 147-149.

74. *Ibid.*

75. *Ibid.* at para. 149.

76. *Ibid.* Note that here Lamer C.J. appears to rely heavily on, among other things, the work of K. McNEIL, *Common Law Aboriginal Title*, Oxford, Clarendon Press, 1989 [hereinafter *Common Law Aboriginal Title*], 73, 201-202.

77. *Delgamuukw*, *ibid.* Note here that Lamer C.J. cites B. SLATTERY “Understanding Aboriginal Rights”, (1987) 66 *Can. Bar Rev.* 727 for this proposition.

With regards to exclusivity, Lamer C.J. explained that the test to establish exclusive occupation must take into account the Aboriginal society at the time of sovereignty<sup>78</sup>. He also contemplated the possibility of joint Aboriginal title, stating that instances of trespass or the sharing of claimed lands at sovereignty would not necessarily preclude a finding of exclusive occupation so long as the group claiming title could show that they had an intention and capacity to retain exclusive control<sup>79</sup>.

This said, a number of questions with respect to this component of the Aboriginal title test remain. For one, until such time as the SCC revisits the test for Aboriginal title it will likely remain unclear as to how precisely the courts are to give equal weight to common law and Aboriginal perspectives in relation to occupation and exclusivity<sup>80</sup>. It is unclear whether this will require courts to simply take evidence of exclusive occupation at both common law and pursuant to Aboriginal laws and perspectives into account, whether claimant Aboriginal groups will be required to prove exclusive occupation under both systems, or whether the courts are to arrive at a standard of occupation representing the middle ground between these two systems. In addition, until the SCC is faced with another Aboriginal title claim we will lack clear and definitive guidance with respect to the precise types of evidence that would tend to demonstrate exclusive occupation at common law and pursuant to Aboriginal perspectives. In addition, it will remain unclear whether the burden will be on Aboriginal groups to demonstrate they used and occupied their lands at sovereignty to the exclusion of all others, or simply to the exclusion of other Aboriginal groups.

It goes without saying that these outstanding issues will present exceptional challenges in cases where Aboriginal title is claimed to water

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78. *Delgamuukw*, *ibid.* at para. 156.

79. *Ibid.* at para. 155-158.

80. Some examples of how both common law and Aboriginal perspectives relating to exclusivity and occupation could play out in the context of Aboriginal title claims to water spaces and submerged lands are found in the Australian jurisprudence in this area. As stated earlier, such jurisprudence must be approached with caution given the differences between the Canadian and Australian approaches of Aboriginal title issues. This said, it is at least interesting to look to the reasons given in the *Lardil Peoples*, *supra*, note 17, and *Yarmirr*, *supra*, note 16, cases. In particular, see Justice Cooper's treatment of Aboriginal perspectives in relation to ownership (at para. 147), Aboriginal land tenure systems (para. 75, 105) and exclusivity (para. 113, 152) in *Lardil Peoples*, as discussed in BEHRENDT, *supra*, note 24 at 12-13. See also Kirby J.J.'s reasons at para. 304-317 of *Yarmirr* with respect to the standards of occupation and exclusivity, and the role of the claimant group's connection with the land in Aboriginal title cases under the Australian *Native Title Act*, *supra*, note 18.

spaces and submerged lands<sup>81</sup>. Where Aboriginal groups claim areas such as the territorial sea of Canada, the Great Lakes or the St. Lawrence Seaway it may well be that the indicators of exclusive occupation one might expect to see in Aboriginal title cases would be largely absent. How would an Aboriginal group show that they exclusively occupied areas known to be our great highways of trade and commerce? Would the existence of Aboriginal trespass laws constitute sufficient evidence of an “intention and capacity” to retain exclusive control so as to support a claim of exclusive occupation<sup>82</sup>? Would Aboriginal groups have to demonstrate that they physically used and occupied the submerged lands in question through the erection of permanent structures (e.g. wharfs, docks, piers) or through use of these lands for activities such as the gathering of shellfish, seaweed, and kelp? Would these groups be able to meet the test set out in *Delgamuukw* by simply demonstrating that they occupied the areas subject to their claims to the extent “reasonably possible” by engaging in fishing, navigation and spiritual activities? Or would a higher standard of occupation apply — at least in those cases where title is claimed in relation to special areas such as the foreshore and the seabed<sup>83</sup>? In addition, one might ask whether courts would view evidence of exclusive occupation of particular offshore and inland areas (e.g. fishing sites) as being representative of exclusive occupation of the whole area being claimed by the Aboriginal title claimants, and whether a finding of Aboriginal title to a vast area of “dry

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81. On this point see BROWN and REYNOLDS, *supra*, note 7 at para. 18-21, and MOODIE, *supra*, note 7 at para. 58-81, where he considers how the *Delgamuukw* Aboriginal title test might apply outside of the “dry land” context, and devotes particular attention to the Haida Nation action seeking, among other things, Aboriginal title to maritime areas adjacent to the Queen Charlotte Islands.

82. See *Delgamuukw*, *supra*, note 3, para. 157.

83. See *Common Law Aboriginal Title*, *supra*, note 76 at 104-105, where McNeil states: “But the foreshore and seabed are different because, except where a pier, retaining wall or the like is built, they cannot be occupied in the same way as other lands. More commonly they are unoccupied, and probably always have been, and are therefore presumed to have remained in the original occupation of the Crown, which extends to all waste lands that have never been held by subjects. Furthermore there are important public rights of navigation and fishing over tidal and coastal waters that need to be protected. Consequently, the ownership of the Crown is for the benefit of the subject. The existence of these rights also excludes to a large extent the possibility of exclusive occupation of the underlying lands.” Though McNeil does not specifically deal with the issue of Aboriginal title in relation to the foreshore or seabed he does seem to imply that given the exceptional character of these lands, long presumed to have remained in the original occupation of the Crown and subject to common law rights or fishing and navigation, they would pose significant evidential challenges in terms of proof of exclusive occupation generally.

land” would be seen as necessarily conferring title to the natural resources, including the waters, minerals, marine life and waterbeds, within the claim area<sup>84</sup>?

These questions serve to highlight once more the need for clarity with respect to the manner in which common law and Aboriginal perspectives should factor into Aboriginal title determinations. It is likely that Aboriginal understandings and laws in relation to their traditional lands would take on great importance in the context of Aboriginal title claims to water spaces and submerged lands given that the physical indicators of exclusive occupation may not be readily available in these particular types of claims.

The compartmentalization of interests relating to lands and waters is not generally characteristic of Aboriginal understandings of land tenure. In fact, many Aboriginal groups define their relationship to their traditional territories as one of stewardship based on an understanding of responsibilities flowing from their special relationship with these territories as opposed to rights arising from this relationship<sup>85</sup>. A more holistic concept of

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84. See K. McNEIL, *Emerging Justice ? Essays on Indigenous Rights in Canada and Australia*, Saskatoon, Native Law Centre of University of Saskatchewan, 2001, at 115. It should also be noted here that the common law provides that a riparian land owner owns the bed of non-tidal waters and non-navigable waters to the center line by virtue of the rebuttable presumption of *ad medium filum aquae*. However, this principle does not apply uniformly across Canada in the case of navigable waters. See: G.V. LAFORÉST, *Water Law in Canada : The Atlantic Provinces*, Ottawa, Department of Regional Economic Expansion, 1973; *Keewatin Power Co. v. Town of Kenora*, (1908) 16 O.L.R. 184 (C.A.) reversing (1906), 13 O.L.R. 237 (H.C.); *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *R. v. Lewis*, [1996] 3 C.N.L.R. 131 (S.C.C.); *R. v. Nikal*, [1996] 3 C.N.L.R. 178 (S.C.C.). Lastly, it is interesting to note that in *New Zealand Tamihana Korokai v. Solicitor General*, (1912) 15 G.L.R. 95; (32 N.Z.L.R. 321), the New Zealand Court of Appeal held that the Native Land Court has jurisdiction to entertain and determine whether any piece of land is Maori customary land, and in ascertaining this it may determine whether or not the Maori were the owners of the bed of any lake or part thereof according to Maori custom, or whether they had merely a right to fish in its waters. In 1918 the Native Land Court vested fee simple title to Lake Waikaremona in the Maori. The Crown appealed this decision (1944), 8 Wellington A.C.M.B. 30) but the Native Appellate Court ultimately affirmed the granting of title in the lakebed to the Maori: See the *Waitangi Tribunal Report on the Crown's Foreshore and Seabed Policy*, *supra*, note 36 at 101.

85. For an excellent discussion on this topic, see C.R. BROWN, *Starboard or Port Tack ? Navigating a Course to Recognition and Reconciliation of Aboriginal Title to Ocean Spaces*, Master's thesis, British Columbia, University of British Columbia, 1999 at 65-76 [hereinafter BROWN], in which she discusses Haida Nation and Tsawwassen First Nation understandings of their interests in lands and territories based on the results of her extensive field research in this area.

territoriality also figures prominently in many Aboriginal cultures, who often view their traditional territories as including elements of water, air, land and resources, and who incorporate principles of ownership, control and jurisdiction based on the need to protect and sustain the environment and its resources<sup>86</sup>. Given this, we are likely to require further guidance with respect to the manner in which we are to reconcile the common law's compartmentalization of principles in relation to land and water<sup>87</sup> and its emphasis on individual entitlements to exclusive use and enjoyment of land<sup>88</sup> with the more holistic approach adopted by many Aboriginal groups in Canada.

Before moving on, it is worth noting that the SCC could decide to give further clarity with respect to some of these issues in the course of rendering its reasons in the *Bernard* and *Marshall* cases heard by the Court on January 17, 2005<sup>89</sup>. While the main issues in both cases arise in the treaty context, the cases also raise interesting Aboriginal title issues, particularly in relation to the requirement of exclusive occupation<sup>90</sup>. Should the Court

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86. See BROWN, *ibid.* at 69 and 71, in which she discusses the Haida Nation and Tsawwassen First Nation understandings of "ownership" and "territoriality".

87. For instance, it is worth noting here that at common law, flowing water is incapable of ownership, and property in the context of water refers to the bundle of rights comprising the right to control the use and flow, diversion, extraction and sale of water, rather than the water itself. See further: W. BLACKSTONE, *Commentaries on the Laws of England*, t. 2 London, University of Chicago, 1979, 18; *Anger and Honsberger, supra*, note 10 at 962.

88. See BROWN, *supra*, note 85 at 75.

89. For a synopsis of Cromwell J.'s judgment in *Marshall, supra*, note 72, see MOODIE, *supra*, note 7 at para. 42.

90. For instance, in his reasons in *Bernard, supra*, note 72, Justice Daigle stated at para. 90 that the Aboriginal title test is highly contextual, and that the occupation requirement varies with the particular perspectives, habits and modes of life of each claimant Aboriginal group. According to the learned Justice, there is no requirement to prove intensive, regular or physical use or every narrowly confined area within a claimed territory where, for instance, the Aboriginal group claiming title is a hunting and gathering community and has traditionally occupied the lands in a manner reflective of their semi-nomadic way of life. He also stated, at para. 173-175, that the test for exclusive occupation focuses solely on the presence of other Aboriginal groups in the lands subject to the title claim. In *Marshall, supra*, note 72, Justice Cromwell stated at para. 153 that the standard of occupation to be used in Aboriginal title determinations is the third standard advanced by Kent McNeil in *Common Law Aboriginal Title, supra*, note 76. This standard represents the middle ground between the minimal occupation that would permit a person to sue a wrongdoer in trespass and the most onerous standard required to ground title by adverse possession. Under this standard, physical acts relied on as proof of occupation would have to be considered in light of the nature of the land and the



choose to deal with these Aboriginal title issues their pronouncements with respect to the Aboriginal title test generally could have implications for cases relating to water spaces and submerged lands.

### 2.2.3 Continuity

Another problematic issue arising from the application of the Aboriginal title test in cases where title is claimed to water spaces and submerged lands relates to the issue of continuity. In setting out the test for proof of Aboriginal title Lamer C.J. recognized that proof of exclusive occupation at sovereignty may be difficult to come by, and accordingly provided that an Aboriginal group may rely on present occupation as proof of pre-sovereignty occupation if they can show, in addition, continuity between pre-sovereignty and present occupation<sup>91</sup>. However, the precise role of the principle of continuity is less clear where there is no reliance on present occupation<sup>92</sup>. In those cases where Aboriginal groups have sufficient evidence of exclusive occupation at sovereignty, it will have to be determined whether they will still be under an obligation to demonstrate that they remained in continuous occupation of their claimed lands over time, or managed to maintain a substantial connection with these lands from pre-sovereignty to the present.

Since many navigable water bodies and offshore areas have been used by members of the public for fishing, navigation, shipping and recreation for centuries one might expect that an Aboriginal group would have more difficulty making out an Aboriginal title claim to these areas if they would

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purposes for which it could be reasonably used. Further, this standard would not require evidence of intensive, regular use of the entire area subject to the Aboriginal title claim. Rather, the question would be whether the acts of occupation in particular areas show the whole area was occupied: *Marshall*, *supra*, note 72 at para. 138.

91. *Delgamuukw*, *supra*, note 3 at para. 143, 152-154.

92. The present state of uncertainty in this area arises, in part, from the apparent inconsistency between Lamer C.J.'s reasons in *Delgamuukw*, *supra*, note 3 at para. 143, 152-154, which imply that continuity need only be shown where reliance is placed on present occupation, and those reasons found at para. 150-151 of his judgment. For instance, at para. 151 Lamer C.J. states that "any land that was occupied pre-sovereignty, and which the parties have maintained a substantial connection with since then, is sufficiently important to be of central significance to the culture of the claimants". This passage seems to imply that exclusive pre-sovereignty occupation is not sufficient for proof of Aboriginal title what is required in addition is proof of the maintenance of a substantial connection between the Aboriginal group and the land over time. In addition, a number of references to the important role of continuity are found elsewhere in both the reasons of Lamer C.J. (para. 83, 126-128, 131, 154) and LaForest J. (para. 190, 193, 195-199), and these references do not solely focus on the "present occupation scenario".

always have to satisfy the continuity component of the Aboriginal title test<sup>93</sup>. Once more, it remains to be seen whether the SCC will provide us with further guidance in this area in the course of rendering its decision in the aforementioned *Bernard* and *Marshall* cases<sup>94</sup>.

### 3 Beyond the Aboriginal Title Test

The above discussion highlights some of the practical legal and evidentiary issues which may arise in the course of applying the test set out in *Delgamuukw* outside of the “dry land” context. Before concluding our discussion in relation to Aboriginal title claims to water spaces and submerged lands it is important to canvass some additional issues that may arise where Aboriginal title is claimed in offshore and inland water areas.

#### 3.1 Reach of the Common Law

One of the issues the courts will be faced with in the context of offshore Aboriginal title claims is whether the common law actually applies in those areas where Aboriginal title is being claimed, and if so, whether it works to recognize property-type rights in these areas such that a finding of Aboriginal title might be at least theoretically possible. If Aboriginal title claims extend into areas where the common law does not apply, courts may well be faced with determining which system of law would apply in its place. Possibilities might include international law or Aboriginal laws and customs. Further, it may fall on our courts to decide whether s. 35 of the *Constitution Act, 1982* has application in areas far into the offshore, such as the exclusive economic zone.

To date, the courts and legislatures have provided us with some guidance with respect to the territorial reach of the common law. The matter was considered in the English case *R. v. Keyn*<sup>95</sup>, which the SCC established

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93. For further information in relation to the implications of the doctrine of continuity in the area of Aboriginal title to water spaces and submerged lands, and the other components of the Aboriginal title test in this context, see K.J. TYLER, *The Division of Powers and Aboriginal Water Rights Issues*, Toronto, National Symposium on Water Law, Environmental Law CLE Program, 1999 [hereinafter TYLER].

94. In *Marshall*, *supra*, note 72, Cromwell J.A. stated at para. 181 that “continuity of occupation from sovereignty to present is not part of the test for aboriginal title if exclusive occupation at sovereignty is established by direct evidence of occupation before and at the time of sovereignty”. Daigle J.A. took this same approach to this issue at para. 58 of *Bernard*, *supra*, note 72.

95. *R. v. Keyn*, (1876) 2 Ex. D. 63 ; 46 L.J.M.C. 17 (Court of Crown Cases Reversed) [hereinafter *Keyn*]. The case concerned a collision between two ships within three miles of the English coast of Dover, resulting in a loss of life. The accused, a German national,

as good law in Canada in *Reference re : Ownership of Off Shore Mineral Rights*<sup>96</sup> and *Reference re : Ownership of the Bed of the Strait of Georgia*<sup>97</sup>. In these two references *Keyn* was interpreted as standing for the proposition that the common law does not extend to areas beyond the low water mark unless explicitly extended to cover such areas through legislation. Interestingly, debates persist with respect to when this might have occurred in the case of Canada's offshore. As seen earlier in relation to the sovereignty aspect of the Aboriginal title test, legislation explicitly extending Canada's realm beyond low water mark is of relatively recent vintage. In addition, even though this legislative gap has now been largely remedied, there are some maritime zones in which Canada only holds "sovereign rights"<sup>98</sup>, as opposed to ownership rights, by virtue of instruments such as the *United Nations Convention on the Law of the Sea* and the *Oceans Act*. In turn, questions remain as to whether these instruments fall short of "extending Canada's realm" such that the common law would apply in these areas<sup>99</sup>.

### 3.2 Underlying Crown Title

According to *Delgamuukw*, Aboriginal title constitutes a burden on the Crown's underlying title. However, the Crown did not acquire this title until it asserted sovereignty over Canada, and as such, Aboriginal title only

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was in command of a ship named the *Franconia* that was passing through these waters en route to a foreign port. He was indicted for manslaughter before the Central Criminal Court, and argued that the English Criminal Courts lacked jurisdiction over an offence committed out of the United Kingdom by a foreigner on board a foreign ship. By a 7:6 majority the Court in *Keyn* held that the English courts did not have jurisdiction over the offence.

96. *Reference re : Ownership of Off Shore Mineral Rights (British Columbia)*, [1967] S.C.R. 792 [hereinafter *Reference re : Ownership of Off Shore Mineral Rights*].

97. *Reference re : Ownership of the Bed of the Strait of Georgia and related areas*, [1984] 1 S.C.R. 388 [hereinafter *Reference re : Ownership of the Bed of the Strait of Georgia*].

98. For instance, by virtue of s. 14 of the 1996 *Oceans Act*, *supra*, note 11, Canada claimed jurisdiction and sovereign rights, including exploration, exploitation, conservation and management of natural resources, to a 200 nautical mile exclusive economic zone. These rights, however, do not include ownership of this maritime zone.

99. As noted above, the judgment in *Yarmirr*, *supra*, note 16, may be worth reviewing in this context. However, it is acknowledged here that not all of the judges of the Australian High Court were in accord with the principle that Aboriginal title could be recognized in areas beyond the low water mark. See in particular the reasons of McHugh J. at para. 104-105 of the decision.

crystallized at the time this sovereignty was asserted by the Crown<sup>100</sup>. The notion that Aboriginal title is a burden on the Crown's underlying title may well become a major issue in the offshore context, at least in those cases where Aboriginal groups claim title to areas where the Crown itself does not even hold title. In such cases the court may be asked to decide whether the underlying Crown title is a "necessary prerequisite" for a finding of Aboriginal title.

Interestingly, the courts in both Australia and New Zealand addressed this issue in the course of providing their reasons in the *Yarmirr* and *Ngati Apa* cases, discussed above. In *Yarmirr* the Australian High Court stated that it is of the very first importance to bear steadily in mind that native title rights and interests are not created by and do not derive from the common law, and therefore the existence of Crown radical title is not a necessary prerequisite to the conclusion that native title rights and interests exist<sup>101</sup>. A similar understanding of the role of underlying or radical Crown title seems to have been adopted by Elias C.J. in the *Ngati Apa* case. According to the learned justice, the radical title of the Crown is merely a "technical and notional concept<sup>102</sup>". Given Lamer C.J.'s statements to the effect that Aboriginal title is a burden on the Crown's underlying title, and accordingly only actually "crystallizes" at sovereignty, it is unclear whether Canadian courts would reach similar conclusions in this regard.

### 3.3 Public and International Rights

Aboriginal title claims to areas such as the foreshore, the sea and the seabed raise questions with respect to the interplay between the nature and content of the Aboriginal title claimed by Aboriginal groups, and the rights held by the public in offshore areas. As seen from the above review of international developments, courts dealing with Aboriginal title claims to offshore areas may be required to consider whether Aboriginal groups would be able to exclusively use and occupy water spaces and submerged

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100. *Delgammukw*, *supra*, note 3 at para. 145.

101. *Yarmirr*, *supra*, note 16 at para. 48-49.

102. *Ngati Apa*, *supra*, note 29 at para. 30.

lands in the face of competing common law public rights of navigation<sup>103</sup> and fishing<sup>104</sup>, as well as international rights of innocent passage.

It will be recalled that in *Yarmirr* the Australian High Court dismissed the argument of the Aboriginal claimants that they should have exclusive rights to the seas and the seabed on the basis of their finding that there was a “fundamental inconsistency” between the asserted Aboriginal title rights and interests, and the common law rights of navigation and fishing, as well as the right of innocent passage<sup>105</sup>. Whether Canadian courts will take a similar approach to this issue is difficult to predict<sup>106</sup>. However, we do have some insight as to the manner in which our courts might deal with issues relating to the interplay between Aboriginal rights and common law public rights.

As mentioned earlier, certain passages in *Van der Peet*<sup>107</sup>, *Delgamuukw*<sup>108</sup>, *Mitchell*<sup>109</sup> and *Gladstone*<sup>110</sup> can be taken as standing for the proposition that Aboriginal rights only survived the assertion of Crown

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103. Public rights of navigation apply to all waterways in Canada that are in fact navigable, and prevail over rights of riparian owners, rights of the owners of the bed, and public rights of fishing. According to Anger and Honsberger it is a question of fact whether waters are navigable which must be determined by an examination of all the circumstances. The essential question to be determined here is whether a waterway is “capable of navigation”. The test for navigability focuses on the utility of the waterway for commercial purposes which may be regarded as being generally and commonly useful for some purpose of trade, agriculture or transportation in some practical and profitable manner. Further, the focus is not on the actual use of the waterway for navigation but rather the adaptability or capability of the waterway for purposes of navigation: see *Anger and Honsberger, supra*, note 10 at 990. It should also be noted here that there is a public right to navigate over the foreshore itself, as well as ancillary rights such as anchoring and mooring: (at 998-999).

104. There is a public right to fish in all tidal waters up to the point where the tide ebbs and flows: *Anger and Honsberger, ibid.* at 996.

105. *Yarmirr, supra*, note 16 at para. 98 and 100.

106. This is particularly so in light of the differences between Canadian and Australian approaches to Aboriginal law. As stated earlier, Australia does not have an equivalent to s. 35 of the *Constitution Act, 1982*, and as such, Aboriginal rights may not be accorded the same level of protection in Australia as they are in Canada. In addition, Aboriginal groups in Canada may well attempt to rely on the reconciliation imperative in s. 35 in order to argue that any potential Aboriginal title rights to submerged lands must be reconciled with common law and international rights in a manner which allows for the recognition of these title rights, perhaps subject to some necessary limitations.

107. See *Van der Peet, supra*, note 2 at para. 49.

108. *Delgamuukw, supra*, note 3 at para. 82.

109. See Binnie J. in *Mitchell, supra*, note 60 at para. 141 and 150.

110. *Gladstone, supra*, note 60 at 770.

sovereignty to the extent they were not incompatible with this sovereignty, or to the extent they were cognizable to, or otherwise did not strain, the Canadian legal and constitutional structure. In addition, in the *Gladstone* case the SCC stated that the elevation of Aboriginal rights to constitutional status was surely not intended to extinguish longstanding common law public rights of fishing<sup>111</sup>.

This said, the Court in *Gladstone* went on to contemplate the possibility of such rights falling second in priority to Aboriginal rights in certain instances<sup>112</sup>. Such a conclusion makes sense in those cases where a court would be faced with balancing Aboriginal fishing rights with public rights of fishing, as was the case in *Gladstone*. However, whether or not public and international rights could actually co-exist with the exclusive use and occupation of offshore and inland water spaces and submerged lands seems to be a different issue which will likely require further consideration in the future<sup>113</sup>.

In addition to the above, the existence of common law public rights and international rights of innocent passage might also signal evidentiary difficulties in terms of proof of Aboriginal title. It is reasonable to suppose that a court would at least consider the fact of these longstanding rights in

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111. *Ibid.* at para. 68.

112. *Ibid.*

113. Outside of the Aboriginal title context a series of English and Canadian cases have found private property rights in geographically limited foreshore and near-tidal areas, and in the beds of navigable waterways – though these rights have been subject to common law rights of fishing and navigation. See for instance: *Nickerson v. AG Canada*, [2000] N.S.J. No. 176 (N.S.S.C.); *AG Canada v. Acadia Forest Products*, (1987) 41 D.L.R. (4th) 338 (F.C.A.); *Tweedie v. The King*, (1915) 52 S.C.R. 197; *Lord Advocate v. Young*, (1887) 12 App. Cas. 544 (H.L. (S.C.)); *The Queen v. Lord*, (1864) 1 P.E.I. 245; *Brown v. Reed*, (1874) 15 N.B.R. 206. See also M.D. WALTERS, “Aboriginal Rights, Magna Carta and Exclusive Rights to Fisheries in the Waters of Upper Canada”, (1998) 23 *Queen’s L.J.* 301. It is also worth noting those US cases in which an inconsistency had been alleged between the claimed rights of Aboriginal claimants and the rights and interests of others in the area subject to the claim. In these cases it was held that the retention of the traditional laws and customs of the claimant groups was to be determined in each case by balancing the respective interests and by upholding these traditional native rights (in these cases the rights of native Hawaiians to enter undeveloped lands owned by others to practice continuously exercised access and gathering rights necessary for subsistence, cultural or religious purposes) so long as no *actual harm* was done by the practice. See: *Kalipi v. Hawaiian Trust Co.*, 656 P. 2d 745 (1982); *Pele Defense Fund v. Paty*, 837 P. 2d 1247 (1992); *Public Access Shoreline Hawaii (PASH) v. Hawai’i County Planning Comm.*, 903 P. 2d 1246, cert. denied, 517 U.S. 1163 (1996).

the course of determining whether an Aboriginal group could have been in exclusive occupation of their lands over time<sup>114</sup>.

Before moving on it should be noted that these complicating factors are also present in the inland context, since common law public rights of navigation are recognized in navigable water bodies, such as the Great Lakes and the St. Lawrence Seaway. In turn, courts dealing with claims in such areas will likely have to consider whether Aboriginal title could co-exist with those longstanding common law rights which apply to Canada's navigable waterways.

### 3.4 Application of Provincial Laws

Aboriginal title claims to water spaces and submerged lands also raise a number of interesting jurisdictional issues. A myriad of legislative enactments seek to control and protect Canada's inland waterways and offshore areas. For instance, several Canadian provinces have enacted legislation vesting the beds of inland navigable waterways in the Crown<sup>115</sup>. In addition, a vast body of provincial environmental and wildlife conservation legislation carries implications for the management and use of both navigable and non-navigable water bodies. In the offshore context, statutory regimes have been established in order to deal with, among other things, offshore oil and gas exploitation<sup>116</sup>. If Aboriginal title were found in water spaces and submerged lands, courts would have to consider the applicability of this complex web of provincial legislation to those areas subject to title given that s. 91(24) of the *Constitution Act, 1867*<sup>117</sup> provides that laws relating to "Indians, and the lands reserved for Indians" fall within the exclusive legislative jurisdiction of the federal government.

The applicability of provincial legislation to matters falling within the scope of s. 91(24) has long been a matter of debate. In *Delgamuukw* Lamer

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114. Kent McNeil makes a similar point in *Common Law Aboriginal Title*, *supra*, note 76 at 104-105, where he states that the existence of these public rights of navigation and fishing also excludes to a large extent the possibility of exclusive occupation of the underlying lands. For further information with respect to these and other issues arising in the offshore context, see: BROWN and REYNOLDS, *supra*, note 7; TZIMAS, *supra*, note 8; REYNOLDS, *supra*, note 28; BROWN, *supra*, note 85; RANKIN, *supra*, note 7.

115. For instance, see the Ontario: *Beds of Navigable Waters Act*, S.O. 1911, c. 6, s. 2; *The Beds of Navigable Waters Amendment Act*, 1951 S.O. 1951, c. 5; *Beds of Navigable Waters Act*, R.S.O. 1990, c. B-4.

116. One example is the British Columbia *Environmental Assessment Act*, S.B.C. 2002, c. 43.

117. *Constitution Act, 1867*, (U.K.) 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [hereinafter *Constitution Act, 1867*].

C.J. stated that this section protects a “core” of Indianness from provincial intrusion through the doctrine of interjurisdictional immunity, and that this core falls within the scope of federal jurisdiction over Indians<sup>118</sup>. According to the learned justice, this core of Indianness encompasses Aboriginal rights, including the rights that are recognized and affirmed by s. 35(1)<sup>119</sup>. Accordingly, laws that purport to extinguish those rights touch the core of Indianness that lies at the heart of s. 91(24), and are beyond the legislative competence of the provinces to enact<sup>120</sup>.

In the context of Aboriginal title claims to water spaces and submerged lands Lamer C.J.’s statements give rise to questions such as the following : Could provincial legislation vesting the beds of navigable waterways in the Crown be seen as an attempt on the part of provincial governments to extinguish any potential Aboriginal title rights in these waterways, and accordingly, be seen as falling outside of the legislative competence of the provinces ? Would provincial legislation governing the management and control of navigable waterways, or directed at water resource management issues, be viewed as legislation of general application, or would such enactments be seen as being specifically aimed at Aboriginal title rights, and thus fall within the core of s. 91(24) ? With respect to this last question it is noted that while the provinces do not have jurisdiction to pass legislation directly aimed at matters falling within s. 91(24), they do still appear to have the ability to incidentally affect matters coming within this section by way of legislation of general application<sup>121</sup>.

### 3.5 International Agreements and Obligations

Lastly, Aboriginal title claims to water spaces and submerged lands may present a number of complex issues in the international context given the existence of international conventions and agreements pertaining to

118. *Delgamuukw*, *supra*, note 3 at para. 178.

119. *Ibid.*

120. *Ibid.* See also: *Côté*, *supra*, note 13 ; *Sparrow*, *supra*, note 60 ; *R. v. Badger*, [1996] 1 S.C.R. 771.

121. For instance, see *Paul v. British Columbia (Forest Appeals Commission)*, 2003 S.C.C. 55. See also: *R. v. Marshall*, [1999] 3 S.C.R. 456 ; [1999] 3 S.C.R. 533 ; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 S.C.C. 31 ; *Dick v. The Queen*, [1985] 2 S.C.R. 309. For further information on this topic, see: TYLER, *supra*, note 93 at 4-15 ; R.H. BARTLETT, *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights*, Saskatoon, Canadian Institute of Resources Law, 1988, at 117. See generally : K. McNEIL, “Aboriginal Title and the Division of Powers : Rethinking Federal and Provincial Jurisdiction”, (1998) 61 *Sask. L. Rev.* 431 ; K. WILKINS, “Of Provinces and Section 35 Rights”, (1999) 22 *Dalhousie L.J.* 185.



Canada's offshore areas and Great Lakes. As noted earlier, Canada's rights in the offshore are subject to the international right of innocent passage, which allow for the passage of ships through a state's territorial sea where such passage is for non-aggressive purposes<sup>122</sup>. In addition, a number of international agreements and conventions provide for the protection and conservation of offshore natural resources and fisheries<sup>123</sup>. Such international instruments could pose major challenges in the offshore context. For instance, in the course of deciding an Aboriginal title claim in the offshore, the courts may have to consider what Canada's international obligations might encompass if Aboriginal title were to be actually found in these areas.

With regards to the inland context, the fact that the Canada-US boundary line passes through the Great Lakes also presents a number of interesting challenges in cases where Aboriginal groups seek title to the Great Lakes and their connecting waterways<sup>124</sup>. For instance, pursuant to the *Boundary Waters Treaty 1909*<sup>125</sup> the navigable boundary waters of the Great Lakes should forever be free and open, and only those parties to the treaty, being Canada and the United States, can have control over these waters<sup>126</sup>. In the least, the existence of such treaty obligations would have to be considered by the courts in the course of assessing the viability of Aboriginal title in this context.

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122. See *UNCLOS*, *supra*, note 71 at article 17, part II. See also BROWN and REYNOLDS, *supra*, note 7, 458, for further discussion on this topic.

123. See BROWN, *supra*, note 85, 17, for further information on international agreements such as the *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks*, U.N. Doc. A/CONF.164/37 (1995). It is worth noting here that negotiations are currently underway among the parties to the *United Nations Convention on Biological Diversity* with respect to access and benefit sharing of respect to genetic resources and organisms. A major issue for many States concerns genetic resources and living organisms in offshore areas. Indigenous groups are actively participating in the negotiations and are pressing a rights agenda. For further information on the convention, see CONVENTION ON BIOLOGICAL DIVERSITY – UNITED NATIONS ENVIRONMENT PROGRAMME, *Homepage*, [Online], 2001, [www.biodiv.org] (January 18, 2005). Douglas Moodie has also noted that the *Draft United Nations Declaration on the Rights of Indigenous Peoples* contains interesting statements of indigenous entitlement to maritime title and resources. See *United Nations Working Group on Indigenous Populations, Draft United Nations Declaration on the Rights of Indigenous Peoples*, August 23 1993, reproduced in [1994] 1 C.N.L.R. 48 at 45, as cited in MOODIE, *supra*, note 7 at para. 4.

124. For a more in-depth discussion of the issues arising in the Great Lakes region by virtue of the Canada-US international boundary, see TZIMAS, *supra*, note 8 at 18-23.

125. Schedule to the *International Boundary Waters Treaty Act*, R.S.C. 1985, c. I-17. The treaty was confirmed and sanctioned in the *International Boundary Waters Treaty Act*: see TZIMAS, *ibid.* at 21.

126. See TZIMAS, *ibid.*, note 8 at 19-20.

## Conclusion

If one central theme emerges from this overview of Aboriginal title to water spaces and submerged lands it is likely that these particular types of claims will present extraordinary challenges in the coming years. A state of uncertainty will continue to prevail in this area until such time as the courts make pronouncements with respect to the viability of these claims. At the same time, negotiations concerning offshore oil and gas exploration and development will continue, statutory and regulatory regimes will continue to govern the use and management of our inland and offshore water areas, and, if the trends in other common law jurisdictions are any indication, more Aboriginal groups may decide to bring title claims to water spaces and submerged lands. So, the question becomes : What are we to do in the meantime ?

Part of the answer may lie with the reconciliation imperative that underpins s. 35(1) of the *Constitution Act, 1982*. We have already seen how the principle of reconciliation might shape determinations with respect to the nature, scope and content of Aboriginal title. In addition, it is clear from existing jurisprudence that the purpose which lies at the core of s. 35(1) also allows for the curtailment of Aboriginal rights and title where the objectives furthered by the imposition of limits on s. 35 rights are of sufficient importance to the broader community as a whole<sup>127</sup>. According to the SCC in *Sparrow*, the government may infringe Aboriginal rights and title in those instances where they are able to justify this infringement pursuant to the test set out. This important decision also introduced the concept of an obligation on the Crown to consult with Aboriginal groups prior to infringement of their constitutionally protected rights. It is likely that the principle of consultation will play an integral role in the context of Aboriginal title claims to water spaces and submerged lands, particularly in those areas subject to extensive governmental regulation and natural resource exploitation.

In its latest pronouncements on the consultation issue in the *Haida*<sup>128</sup> and *Taku River*<sup>129</sup> cases the SCC held that both the federal and provincial Crowns have an obligation, based in the honour of the Crown, to consult

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127. *Gladstone*, *supra*, note 60, para. 73. See also : *Sparrow*, *supra*, note 60 ; *Mitchell*, *supra*, note 60 ; *Van der Peet*, *supra*, note 2 ; *Delgamuukw*, *supra*, note 3.

128. *Haida Nation v. British Columbia (Minister of Forests)*, 2004 S.C.C. 73 [hereinafter *Haida*].

129. *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 S.C.C. 74 [hereinafter *Taku River*].

with Aboriginal groups, and if appropriate, to accommodate their interests<sup>130</sup>. This obligation is said to arise where the Crown has knowledge, real or constructive, of the *potential* existence of Aboriginal rights or title, and contemplates conduct that might adversely affect these rights<sup>131</sup>. Importantly, the Court stressed that this obligation arises prior to proof of Aboriginal rights and title since limiting such reconciliation to the post-proof sphere risks unfortunate consequences — Aboriginal peoples could find their land and resources changed and denuded by the time the goal of proof is finally reached<sup>132</sup>.

While it is not yet clear whether Aboriginal title to water spaces and submerged lands constitute s. 35(1) rights<sup>133</sup>, the consultation principles articulated by the SCC in these cases will still likely play a prominent role in those situations where Aboriginal groups have asserted this particular form of title. The SCC's strong pronouncements with respect to the Crown's duty of honourable dealings towards Aboriginal peoples, said to arise from the Crown's assertion of sovereignty over Aboriginal people and their *de facto* control over land and resources formerly in the control of Aboriginal groups, lend support to this proposition<sup>134</sup>.

However, seriously considering the role of consultation in the context of Aboriginal title claims to waters and submerged lands will not provide a complete answer to the question posed above. We will eventually have to turn our minds to the question of whether the test set out in *Delgamuukw* is an appropriate instrument to use where Aboriginal title claims fall outside common law concepts of property ownership. In addition, there may well be a need to look beyond the confines of available jurisprudence and to begin to truly think about how Aboriginal perspectives relating to land use and occupation should factor into our understandings of Aboriginal title. After all, these traditional patterns of use and occupation constitute the source of Aboriginal title, and as such, mandate both our understanding and our respect.

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130. *Haida*, *supra*, note 128 at para. 25-35.

131. *Ibid.*

132. *Ibid.* at para. 33.

133. At para. 37 of *Haida*, *ibid.*, the SCC states that knowledge of a *credible* but unproven claim suffices to trigger a duty to consult and accommodate. Thus, the key issue in the context of claims to water spaces and submerged lands will be whether these particular claims will be viewed as being credible.

134. *Haida*, *ibid.* at para. 32.